

R.C. 2743.02(F) states, in part:

A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer, or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***

R.C. 9.86 states, in part:

*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. ***

The determination of whether a physician is entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.* (1992), 64 Ohio St.3d 396; citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284. The question of whether the physician acted manifestly outside the scope of his state employment is one of fact. *Lowery v. Ohio State Highway Patrol* (February 27, 1997), Franklin App. No. 96AP107-835, unreported.

In *Ferguson v. OSU* (June 22, 1999), Franklin App. No. 98AP-863, unreported, the court set forth indicia that may be considered in determining whether a physician is entitled to

civil immunity. The factors can be divided into two basic categories: those that focus on the nature of the work being performed by the physician at the time period in question and those that concern the nature of the relationship between the private practice group and the state entity. That court also stated that one of the key questions is whether the physician either saw the patient only in the capacity as an attending physician supervising residents or saw that individual as a private patient. It has repeatedly been held that physicians are entitled to civil immunity when their only contact with a patient is in their capacity as faculty physicians supervising residents.

See, e.g., *Allen v. University of Cincinnati Hosp.* (1997), 122 Ohio App.3d 195; *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69; *Chitwood v. Univ. Medical Ctr.* (May 5, 1998), Franklin App. No. 97AP109-1235, unreported.

In the present case, Lieurance was assigned to and treated by Dr. Dain at Drake Center, Inc. (Drake) from February 20, to March 21, 1997. She was admitted for rehabilitative therapy following a coronary artery by-pass graft, aortic valve replacement and mitral valvuloplasty. Plaintiffs' complaint alleges that defendant failed properly to treat plaintiff's pressure sores and that such failure ultimately led to a fatal infection. In his deposition, Dr. Dain stated that it was the generally accepted practice for patients to be seen at least three times per week. However, there were occasions when he saw Lieurance multiple times during a given day. While resident physicians could perform services at Drake, they were not always present when Dr. Dain attended to Lieurance.

[Cite as *Lieurance v. Univ. of Cincinnati*, 2001-Ohio-1845.]

Drake is a nonprofit hospital funded by Hamilton County. Neither UC nor the Division of General Internal Medicine had a contract with Drake. However, UIMA had an agreement with Drake to provide internal medicine services. According to Dr. Dain's deposition, his agreement with UIMA required that he spend seventy percent of his time at Drake, ten percent of his time at the University Hospital seeing patients and teaching residents, ten percent "scattered" among a wide variety of places, and the remaining ten percent "more often than not" spent at Drake. UIMA was not required to contract only with state entities. Further, not all UIMA physicians were UC faculty members, and not all Drake physicians were associated with UIMA.

Dr. Dain was recruited by Robert Wones, M.D., the Director of the Department of General Internal Medicine, to serve as an attending physician at Drake. Dr. Wones testified that he simply could not employ physicians for Drake at the \$20,000 annual salary provided by UC. In Dr. Dain's case, the combined salary received from UC and UIMA was \$129,043 for 1997. Of that amount, \$99,717 was paid by UIMA. Dr. Dain also received a \$4,500 "Drake bonus." The salary received from UC was paid separately. Additionally, UIMA maintained a 401(K) retirement account for its employees, whereas UC paid into the State Teachers Retirement System. Medical malpractice insurance was provided by UIMA.

Notwithstanding the aforementioned facts, defendant maintains that Dr. Dain's clinical practice was an integral part of his UC employment. Defendant likens this case to *Garvin v. Univ. of Cincinnati Hospital* (May 21, 1998), Franklin App. No. 97API09-1279, wherein the Tenth District Court of Appeals held that Dr. Sigmund, another UIMA physician, was entitled to civil

immunity. In that case, the court relied primarily upon "the absence of any evidence showing the relationship between UIMA and UC to be one of an independent contractor, or that Dr. Sigmund directly profited from the fees generated through the services he provided through UIMA." *Id.* at 7.

The court finds that the instant case is factually distinguishable from *Garvin*, since there was little or no evidence in that case about how Dr. Sigmund came to be assigned to plaintiff's case nor was there any evidence that he was employed at a completely separate institution such as the Drake Center at issue herein. The preponderance of the evidence in this matter simply fails to establish that Dr. Dain was fulfilling any professorial or teaching function for UC when he provided the patient care in question. Further, in this case evidence does exist that Dr. Dain "directly profited" from the services he provided through UIMA since he received a separate "Drake bonus."

Defendant further maintains that the General Assembly has conferred broad discretion upon the UC Board of Trustees to hire professors and that such discretion implicitly includes the ability to define the scope of employment. In this case, it is defendant's position that "scope of employment" is expressly defined by the Board of Trustees as including the patient care provided by Dr. Dain at Drake hospital. However, the court in *Garvin* noted that the Board of Trustees may not, by its assignment of duties to faculty members, determine whether a particular physician is functioning within the scope of state

employment. *Id.* at 5. To hold otherwise, would be to circumvent the entire purpose of R.C. 2743.02(F) and 9.86.

Accordingly, the court concludes that Dr. Dain treated Lieurance as a private patient and, as such, he is not entitled to civil immunity.

FRED J. SHOEMAKER
Judge
IN THE COURT OF CLAIMS OF OHIO

STEVEN A. LIEURANCE, Co-Exec., :
et al. :

Plaintiffs

v.

UNIVERSITY OF CINCINNATI

Defendant

: : : : : : : : : : : : : : :

: CASE NO. 99-07134
:
: JUDGMENT ENTRY
:
: Judge Fred J. Shoemaker

Upon review of the evidence, and for the reasons set forth in the decision filed concurrently herewith, the court finds that Dr. Peter Dain is not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Therefore, the courts of common pleas have jurisdiction over civil actions against him based upon Dr. Dain's alleged actions and inactions in this case. Pursuant to Civ. R. 54(B), this court makes the express determination that there is no just reason for delay.

FRED J. SHOEMAKER
Judge

Entry cc:

Daniel J. Buckley
Rodney L. Drinnon
Atrium Two, Suite 2100
221 E. Fourth Street
Cincinnati, Ohio 45202

Attorneys for Plaintiffs

[Cite as *Lieurance v. Univ. of Cincinnati*, 2001-Ohio-1845.]

James P. Miller
145 North South Street
Wilmington, Ohio 45177

Susan M. Sullivan
65 East State St., 16th Fl.
Columbus, Ohio 43215

Assistant Attorney General

LH/cmd

Filed 8-27-2001

Jr. Vol. 678, Pgs. 126-127

To S.C. reporter 10-4-2001